In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 129

JESSIE C. BABB, *Petitioner*

v.

MANDEL BENJAMIN, Chief of the Chicago Area, Social Security Administration, et al.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit And Motion For Leave To File A Petition For A Writ Of Mandamus

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

None of the questions presented by the petition and motion is properly before this Court. The absence of any basis for certiorari or mandamus is readily apparent from the facts of this litigation, which may be summarized as follows:

Prior to October 1, 1948, petitioner and one Emanuel C. Sigler were war service indefinite appointees employed as adjudication reviewers in

the Chicago area office of the Social Security Administration, Federal Security Agency. The selection of qualified eligibles for probational appointment to positions as adjudication reviewers made necessary the termination of the employment of petitioner and Sigler on October 1, 1948.

Thereafter, petitioner and Sigler instituted these suits in the United States District Court for the Northern District of Illinois, seeking reinstatement to their former positions, money damages, and other relief. The defendants moved to dismiss the complaints on jurisdictional grounds and for failure to state a cause of action. On July 5, 1950, the District Court granted the motions in both cases and dismissed the complaints, with prejudice and without leave to amend. Petitioner and Sigler appealed to the Court of Appeals for the Seventh Circuit. While the appeals were pending, petitioner was declared incompetent, and David R. Babb was appointed conservator of her estate and substituted as plaintiff-appellant on the appeals. Thereafter, David R. Babb, as conservator of petitioner's estate, and Sigler moved for dismissal of the pending appeals. On April 10, 1952, pursuant to the motion, the Court of Appeals dismissed the appeals. The record discloses no further proceedings in either the Court of Appeals or the District Court.

Although petitioner alleges that on or about April 4, 1952, her disability was removed by order

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of the County Court of Cook County, Illinois, petitioner admits (Pet. 4) that as yet the estate has not been closed nor the conservator removed. The petition contains no allegation that the action of the conservator in moving for dismissal of the appeal was improper or unauthorized. Even if the petition contained such an allegation, the questions raised thereby, involving as they do the responsibilities and authority of a conservator appointed under Illinois law, should first be considered and decided by the federal court from which this case comes. *Huddleston* v. *Dwyer*, 322 U.S. 232, 237.[1]

Moreover, petitioner has made no attempt to have herself substituted for the conservator of her estate and on the records before this Court she is no longer a party to either suit. Nor has petitioner made any attempt to have the appeals reinstated, to obtain a rehearing in the Court of Appeals, or to take new appeals to that Court. Accordingly, the Court of Appeals has passed upon neither the questions which petitioner

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[1] Illinois law provides that a conservator, under the direction of the probate court, shall have the care, management and investment of the ward's estate, Jones Illinois Statutes Annotated, § 110.371, that he shall appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose, *id.*, § 110.373, and that if either party to a suit becomes insane, the cause may be prosecuted or defended by his conservator in like manner as by an executor or administrator in case of the death of a party, *id.*, § 107.019.

attempts to raise here nor the propriety of the District Court's orders dismissing the complaints. This Court has no occasion to decide questions which were not presented to or passed upon by the Court of Appeals, *United States* v. *Fleischman,* 339 U.S. 349; *Owens* v. *Union Pacific R. Co.,* 319 U.S. 715; *Sonzinsky* v. *United States,* 300 U.S. 506, particularly where, as here, the appeals were dismissed by the Court of Appeals on the motion of the plaintiff-appellants of record. Cf. *Central Transportation Co.* v. *Pullman's Car Co.,* 139 U.S. 24, 39; *Evans* v. *Phillips,* 4 Wheat. 73; *U. S.* v. *Evans,* 5 Cranch 280; *Kelly* v. *Great Atlantic & Pacific Tea Company,* 86 F. 2d 296 (C.A. 4); *Francisco* v. *Chicago & A. R. Co.,* 149 Fed. 354 (C.A. 8).[2]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari and motion for leave to file a petition for a writ of mandamus should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1952.

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[2] In addition to seeking certiorari, petitioner moves for leave to petition for a writ of mandamus to compel "the appropriate judge or judges and/or officer or officers of the United States" to restore her to her position (Pet. 2, 6). The facts outlined above leave no doubt that this motion is at least as groundless as the petition for certiorari.

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